

MORGAN, LEWIS & BOCKIUS LLP
NICOLE A. DILLER (State Bar No. 154842)
LISA S. SEREBIN (State Bar No. 146312)
ANDREW C. SULLIVAN (State Bar. No. 226902)
One Market, Spear Street Tower
San Francisco, California 94105
Telephone: (415) 442-1000
Facsimile: (415) 442-1001

Attorneys for North Star Trust Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ and LORA
SMITH, individually and on behalf of a
class of all other persons similarly situated,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.;
K-M INDUSTRIES HOLDING CO., INC.
ESOP PLAN COMMITTEE; WILLIAM
E. AND DESIREE B. MOORE
REVOCABLE TRUST; TRUSTEES OF
THE WILLIAM E. AND DESIREE B.
MOORE REVOCABLE TRUST;
ADMINISTRATOR OF THE ESTATE OF
WILLIAM E. MOORE, DECEASED; CIG
ESOP PLAN COMMITTEE; and NORTH
STAR TRUST COMPANY,

Defendants.

Case No. C06-07339 MJJ

**NORTH STAR TRUST COMPANY'S
ANSWER TO COMPLAINT**

1 Defendant North Star Trust Company (“North Star”) Answers Plaintiffs’ Complaint as
2 follows:

3 1. The statements set forth in Paragraph 1 of the Complaint constitute legal assertions
4 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said
5 statements could be construed to contain allegations of fact, North Star denies each and every
6 such allegation. North Star admits, however, that Plaintiffs purport to bring this action under
7 ERISA Section 502, 29 U.S.C. § 1132, under which subject matter jurisdiction would be
8 conferred pursuant to ERISA Section 502(e), 29 U.S.C. § 1132(e).

9 2. The statements set forth in Paragraph 2 of the Complaint constitute legal assertions
10 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said
11 statements could be construed to contain allegations of fact, North Star denies each and every
12 such allegation. North Star does not, however, contest that this Court has subject matter
13 jurisdiction over this matter.

14 3. The statements set forth in Paragraph 3 of the Complaint constitute legal assertions
15 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said
16 statements could be construed to contain allegations of fact, North Star denies each and every
17 such allegation. North Star does not, however, contest that venue is proper in this district.

18 4. North Star denies each and every allegations set forth in Paragraph 4 of the
19 Complaint, except admits that the K-M Industries Holding Co., Inc. Employee Stock Ownership
20 Plan (the “KMH Plan”) is administered in San Mateo County.

21 5. North Star lacks sufficient information to either admit or deny the allegations set
22 forth in Paragraph 5 of the Complaint and, on that basis, denies each and every such allegation,
23 except admits that Plaintiff Thomas Fernandez has been a participant, within the meaning of
24 ERISA Section 3(7), 29 U.S.C. § 1002(7), in the KMH Plan since North Star became trustee of
25 the KMH Plan on April 22, 2003.

26 6. North Star lacks sufficient information to either admit or deny the allegations set
27 forth in Paragraph 6 of the Complaint and, on that basis, denies each and every such allegation,
28 except admits that Plaintiff Lora Smith has been a participant, within the meaning of ERISA

1 Section 3(7), 29 U.S.C. § 1002(7), in the KMH Plan since North Star became trustee of the KMH
2 Plan on April 22, 2003.

3 7. The statements set forth in Paragraph 7 of the Complaint constitute legal assertions
4 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said
5 statements could be construed to contain allegations of fact, North Star denies each and every
6 allegation, except admits that KMH was the sponsor of the KMH Plan, within the meaning of
7 ERISA Section 3(16)(B), 29 U.S.C. § 1002(16)(B), since North Star became trustee of the KMH
8 Plan on April 22, 2003, admits that KMH was the administrator of the KMH Plan, within the
9 meaning of ERISA Section 3(16)(A), 29 U.S.C. § 1002(16)(A), since North Star became trustee
10 of the KMH Plan on April 22, 2003, and asserts that the terms of the KMH Plan speak for
11 themselves.

12 8. Responding to Paragraph 8 of the Complaint, North Star asserts that the statements
13 set forth in the first sentence thereof constitute legal assertions and conclusions, rather than
14 factual allegations, thereby requiring no answer; to the extent said statements could be construed
15 to contain allegations of fact, North Star denies each and every such allegation. North Star admits
16 that William E. Moore and Desiree B. Moore were, at one time, trustees of the William E. and
17 Desiree B. Moore Revocable Trust (the "Trust"). Except as expressly admitted or otherwise
18 answered, North Star lacks sufficient information to either admit or deny the allegations set forth
19 in Paragraph 8 and, on that basis, denies each and every such allegation.

20 9. Responding to Paragraph 9 of the Complaint, North Star lacks sufficient
21 information to either admit or deny the allegations set forth in the first and fourth sentences
22 thereof and, on that basis, denies each and every such allegation. The statements set forth in the
23 second and third sentences of Paragraph 9 constitute legal assertions and conclusions, rather than
24 factual allegations, thereby requiring no answer; to the extent said statements could be construed
25 to contain allegations of fact, North Star denies each and every such allegation.

26 10. Responding to Paragraph 10 of the Complaint, North Star lacks sufficient
27 information to either admit or deny the allegations set forth in the first and fifth sentences thereof
28 and, on that basis, denies each and every such allegation. North Star admits that Mr. Moore was,

1 at one time, a trustee of the Trust. The statements set forth in the second, third, and sixth
2 sentences of Paragraph 10 constitute legal assertions and conclusions, rather than factual
3 allegations, thereby requiring no answer; to the extent said statements could be construed to
4 contain allegations of fact, North Star denies each and every such allegation. Except as expressly
5 answered or otherwise admitted, North Star denies each and every allegation set forth in
6 Paragraph 10.

7 11. Responding to Paragraph 11 of the Complaint, the statements set forth in the first,
8 second and third sentences thereof constitute legal assertions and conclusions, rather than factual
9 allegations, thereby requiring no answer; to the extent said statements could be construed to
10 contain allegations of fact, North Star denies each and every such allegations. North Star lacks
11 sufficient information to either admit or deny the allegations set forth in the fourth and fifth
12 sentences of Paragraph 11 and, on that basis, denies each and every such allegation, except admits
13 that the California Capital Insurance Company Employee Stock Ownership Plan (the "CIG Plan")
14 was merged into the KMH Plan on July 16, 1999, and that William Moore was at times a trustee
15 and settlor of the Moore Trust.

16 12. Responding to Paragraph 12 of the Complaint, North Star admits that its principal
17 place of business is Chicago, Illinois, and that it serves as the trustee of the KMH Plan. North
18 Star asserts that the statements set forth in the third sentence of Paragraph 12 constitute legal
19 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
20 extent said statements could be construed to contain allegations of fact, North Star denies each
21 and every such allegation. Except as expressly admitted or otherwise answered, North Star
22 denies each and every allegation set forth in Paragraph 12.

23 13. The statements set forth in Paragraph 13 of the Complaint constitute legal
24 assertions and conclusions, rather than factual allegations, thereby requiring no answer. Further,
25 said statements do not allege facts, but merely define terms, making an answer neither necessary
26 nor appropriate. To the extent said statements could be construed to contain allegations of fact,
27 North Star denies each and every such allegation.

28 14. North Star denies each and every allegation set forth in Paragraph 14 of the

1 Complaint, except admits and alleges that Kelly-Moore Paint Company, Inc. (“Kelly-Moore
2 Paint”) and California Capital Insurance Company are wholly owned subsidiaries of K-M
3 Industries Holding Co., Inc., that Kelly-Moore Paint is headquartered in San Carlos, California,
4 and that California Capital Insurance Company is headquartered in Monterey, California.

5 15. North Star lacks sufficient information to either admit or deny the allegations set
6 forth in Paragraph 15 of the Complaint and, on that basis, denies each and every such allegation,
7 except admits that Kelly-Moore Paint has been named as a defendant in various lawsuits arising
8 out of the manufacture of asbestos-containing joint compound, wall, and ceiling texture by Paco
9 Textures Corporation, a former subsidiary of Kelly Moore Paint, which was dissolved in January
10 1982.

11 16. North Star lacks sufficient information to either admit or deny the allegations set
12 forth in Paragraph 16 of the Complaint and, on that basis, denies each and every such allegation,
13 except admits and alleges that Kelly-Moore Paint purchased California Mutual Insurance
14 Company (now known as California Capital Insurance Company) in 1986.

15 17. North Star denies each and every allegation set forth in Paragraph 17 of the
16 Complaint, except admits that in 1998 Kelly-Moore Paint changed its name to K-M Industries
17 Holding Co., Inc; alleges that a new California company was incorporated and named Kelly-
18 Moore Paint Company, Inc.; admits that Kelly-Moore Paint Company and California Capital
19 Insurance Company are wholly owned subsidiaries of K-M Industries Holding Co., Inc.; and
20 admits that the William E. and Desiree B. Moore Revocable Trust has been the majority
21 shareholder in KMH since 1998.

22 18. North Star denies each and every allegation set forth in Paragraph 18 of the
23 Complaint, except admits that Series P stock reflects the value of Kelly Moore Paint Company,
24 Inc., and that Series I stock reflects the value of California Capital Insurance Company.

25 19. North Star lacks sufficient information to either admit or deny the allegations set
26 forth in Paragraph 19 of the Complaint and, on that basis, denies each and every such allegation,
27 except admits and alleges that KMH sued Union Carbide in Texas and that the publicly filed
28 documents in that litigation speak for themselves.

1 20. North Star admits the allegations set forth in Paragraph 20 of the Complaint.

2 21. North Star admits the allegations set forth in Paragraph 21 of the Complaint.

3 22. North Star denies each and every allegation set forth in Paragraph 22, except
4 admits that the CIG Plan was merged into the Kelly-Moore Paint Company, Inc. Employee Stock
5 Ownership Plan (the "Paint Plan") effective July 16, 1999 and that the KMH Plan was
6 administered in San Carlos, California, and alleges that the terms of the KMH Plan speak for
7 themselves.

8 23. North Star lacks sufficient information to either admit or deny the allegations set
9 forth in Paragraph 23 of the Complaint and, on that basis, denies each and every such allegation.

10 24. North Star denies each and every allegation set forth in Paragraph 24 of the
11 Complaint, except admits and alleges that the Paint Plan purchased 33,745,455 shares of KMH
12 Series P-B stock on October 13, 1998 for \$232 million (\$6.875 per share), that the Paint Plan
13 borrowed \$232 million pursuant to a promissory note dated October 13, 1998, the terms of which
14 speak for themselves, and that the share price was determined based on a valuation report, the
15 terms of which speak for themselves.

16 25. North Star lacks sufficient information to either admit or deny the allegations set
17 forth in Paragraph 25 of the Complaint and, on that basis, denies each and every such allegation.

18 26. The statements set forth in Paragraph 26 of the Complaint constitute legal
19 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
20 extent said statements could be construed to contain allegations of fact, North Star denies each
21 and every such allegation.

22 27. North Star lacks sufficient information to either admit or deny said allegations set
23 forth in Paragraph 27 of the Complaint and, on that basis, denies each and every such allegation.

24 28. North Star lacks sufficient information to either admit or deny said allegations set
25 forth in Paragraph 28 of the Complaint and, on that basis, denies each and every such allegation.

26 29. North Star lacks sufficient information to either admit or deny the allegations set
27 forth in Paragraph 29 of the Complaint and, on that basis, denies each and every such allegation.

28 30. North Star lacks sufficient information to either admit or deny the allegations set

1 forth in Paragraph 30 of the Complaint and, on that basis, denies each and every such allegation.

2 31. North Star denies each and every allegation set forth in Paragraph 31 of the
3 Complaint, except admits and alleges that the CIG Plan purchased 8,400,000 shares of KMH
4 Series I-B stock on October 18, 1999 for \$55 million (\$6.55 per share (rounded)), that the KMH
5 Plan borrowed \$55 million from KMH to finance the purchase, and that the share price was
6 determined based on a valuation report, the terms of which speak for themselves.

7 32. North Star lacks sufficient information to either admit or deny the allegations set
8 forth in Paragraph 32 of the Complaint and, on that basis, denies each and every allegation.

9 33. North Star lacks sufficient information to either admit or deny the allegations set
10 forth in Paragraph 33 of the Complaint and, on that basis, denies each and every allegation.

11 34. North Star lacks sufficient information to either admit or deny said allegations set
12 forth in Paragraph 34 of the Complaint and, on that basis, denies each and every such allegation.

13 35. North Star lacks sufficient information to either admit or deny the allegations set
14 forth in Paragraph 35 of the Complaint and, on that basis, denies each and every such allegation.

15 36. North Star lacks sufficient information to either admit or deny said allegations set
16 forth in Paragraph 36 of the Complaint and, on that basis, denies each and every such allegation.

17 37. North Star lacks sufficient information to either admit or deny the allegations set
18 forth in Paragraph 37 of the Complaint and, on that basis, denies each and every such allegation.

19 38. North Star lacks sufficient information to either admit or deny the allegations set
20 forth in Paragraph 38 of the Complaint and, on that basis, denies each and every such allegation.

21 39. North Star lacks sufficient information to either admit or deny the allegations set
22 forth in Paragraph 39 of the Complaint and, on that basis, denies each and every such allegation.

23 40. North Star lacks sufficient information to either admit or deny the allegations set
24 forth in Paragraph 40 of the Complaint and, on that basis, denies each and every such allegation.

25 41. North Star denies each and every allegation set forth in Paragraph 41 of the
26 Complaint.

27 42. North Star denies each and every allegation set forth in Paragraph 42 of the
28 Complaint, except admits and alleges that the KMH Plan did not provide Summary Annual

1 Reports of the KMH Plan to KMH Plan participants in Plan Years 2003 and 2004, and that the
2 Department of Labor's investigation of the KMH Plan's failure to do so resulted in the issuance
3 of a formal "no action" letter by the Department of Labor.

4 43. North Star denies each and every allegation set forth in Paragraph 43 of the
5 Complaint.

6 44. North Star admits the allegations set forth in Paragraph 44 of the Complaint.

7 45. North Star asserts that the statements set forth in Paragraph 45 of the Complaint
8 constitute legal assertions and conclusions, rather than factual allegations, thereby requiring no
9 answer; to the extent said statements could be construed to contain allegations of fact, North Star
10 denies each and every such allegation.

11 46. North Star lacks sufficient information to either admit or deny the allegations set
12 forth in Paragraph 46 of the Complaint and, on that basis, denies each and every such allegation.

13 47. North Star denies each and every allegation set forth in Paragraph 47 of the
14 Complaint.

15 48. North Star denies each and every allegation set forth in Paragraph 48 of the
16 Complaint.

17 49. North Star denies each and every allegation set forth in Paragraph 49 of the
18 Complaint.

19 50. North Star lacks sufficient information to either admit or deny the allegations set
20 forth in Paragraph 50 of the Complaint and, on that basis, denies each and every such allegation.

21 51. The statements set forth in Paragraph 51 of the Complaint constitute legal
22 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
23 extent said statements could be construed to contain allegations of fact, North Star denies each
24 and every such allegation, except admits that Plaintiffs purport to bring this action on behalf of a
25 class, and alleges that Plaintiffs' definition of the purported class speaks for itself.

26 52. The statements set forth in Paragraph 52 of the Complaint constitute legal
27 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
28 extent said statements could be construed to contain allegations of fact, North Star denies each

1 and every such allegation, except lacks sufficient information to either admit or deny the
2 allegations set forth in the third sentence of Paragraph 52 and, on that basis, denies each and
3 every such allegation.

4 53. The statements set forth in Paragraph 53 of the Complaint, and each subparagraph
5 thereof, constitute legal assertions and conclusions, rather than factual allegations, thereby
6 requiring no answer; to the extent said statements could be construed to contain allegations of
7 fact, North Star denies each and every such allegation.

8 54. The statements set forth in Paragraph 54 of the Complaint constitute legal
9 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
10 extent said statements could be construed to contain allegations of fact, North Star denies each
11 and every such allegation.

12 55. North Star denies each and every allegation set forth in Paragraph 55 of the
13 Complaint, except lacks sufficient information to either admit or deny the allegations set forth in
14 the first sentence of Paragraph 55 thereof and, on that basis, denies each and every such
15 allegation, except does not contest that Plaintiffs' counsel is qualified to handle this litigation.

16 56. The statements set forth in Paragraph 56 of the Complaint constitute legal
17 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
18 extent said statements could be construed to contain allegations of fact, North Star denies each
19 and every such allegation.

20 57. The statements set forth in Paragraph 57 of the Complaint constitute legal
21 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
22 extent said statements could be construed to contain allegations of fact, North Star denies each
23 and every such allegation.

24 58. The statements set forth in Paragraph 58 of the Complaint constitute legal
25 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
26 extent said statements contain allegations of fact, North Star lacks sufficient information to either
27 admit or deny such allegations and, on that basis, denies each and every such allegation.

28 59. By way of responding to Paragraph 59 of the Complaint, North Star incorporates

1 by reference herein its responses to Paragraphs 1 through 58 above, as though fully set forth
2 herein.

3 60. The statements set forth in Paragraph 60 of the Complaint constitute legal
4 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
5 extent said statements could be construed to contain allegations of fact, North Star denies each
6 and every such allegation.

7 61. The statements set forth in Paragraph 61 of the Complaint constitute legal
8 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
9 extent said statements could be construed to contain allegations of fact, North Star denies each
10 and every such allegation.

11 62. The statements set forth in Paragraph 62 of the Complaint constitute legal
12 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
13 extent said statements could be construed to contain allegations of fact, North Star denies each
14 and every such allegation.

15 63. The statements set forth in Paragraph 63 of the Complaint constitute legal
16 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
17 extent said statements could be construed to contain allegations of fact, North Star denies each
18 and every such allegation.

19 64. North Star denies each and every allegation set forth in the second and fourth
20 sentences of Paragraph 64 of the Complaint. The statements set forth in the first and third
21 sentences of Paragraph 64 constitute legal assertions and conclusions, rather than factual
22 allegations, thereby requiring no answer; to the extent said statements could be construed to
23 contain allegations of fact, North Star denies each and every such allegation.

24 65. The statements set forth in Paragraph 65 of the Complaint constitute legal
25 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
26 extent said statements could be construed to contain allegations of fact, North Star denies each
27 and every such allegation.

28 66. North Star denies each and every allegation set forth in Paragraph 66 of the

1 Complaint.

2 67. By way of responding to Paragraph 67 of the Complaint, North Star incorporates
3 by reference herein its responses to Paragraphs 1 through 58 above, as though fully set forth
4 herein.

5 68. The statements set forth in Paragraph 68 of the Complaint constitute legal
6 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
7 extent said statements could be construed to contain allegations of fact, North Star denies each
8 and every such allegation.

9 69. The statements set forth in Paragraph 69 of the Complaint constitute legal
10 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
11 extent said statements could be construed to contain allegations of fact, North Star denies each
12 and every such allegation.

13 70. The statements set forth in Paragraph 70 of the Complaint constitute legal
14 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
15 extent said statements could be construed to contain allegations of fact, North Star denies each
16 and every such allegation.

17 71. North Star denies each and every allegation set forth in the second, third, and
18 fourth sentences of Paragraph 71 of the Complaint. The statements set forth in the first sentence
19 of Paragraph 71 constitutes legal assertions and conclusions, rather than factual allegations,
20 thereby requiring no answer; to the extent said statements could be construed to contain
21 allegations of fact, North Star denies each and every such allegation.

22 72. North Star denies each and every allegation set forth in the second, third, and
23 fourth sentences of Paragraph 72 of the Complaint. The statements set forth in the first sentence
24 of Paragraph 72 constitutes legal assertions and conclusions, rather than factual allegations,
25 thereby requiring no answer; to the extent said statements could be construed to contain
26 allegations of fact, North Star denies each and every such allegation.

27 73. North Star denies each and every allegation set forth in Paragraph 73 of the
28 Complaint.

1 74. The statements set forth in Paragraph 74 of the Complaint constitute legal
2 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
3 extent said statements could be construed to contain allegations of fact, North Star denies each
4 and every such allegation.

5 75. The statements set forth in Paragraph 75 of the Complaint constitute legal
6 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
7 extent said statements could be construed to contain allegations of fact, North Star denies each
8 and every such allegation.

9 76. The statements set forth in Paragraph 76 of the Complaint constitute legal
10 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
11 extent said statements could be construed to contain allegations of fact, North Star denies each
12 and every such allegation.

13 77. North Star denies each and every allegation set forth in Paragraph 77 of the
14 Complaint.

15 78. North Star denies each and every allegation set forth in Paragraph 78 of the
16 Complaint.

17 79. The statements set forth in Paragraph 79 of the Complaint constitute legal
18 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the
19 extent said statements could be construed to contain allegations of fact, North Star denies each
20 and every such allegation.

21 80. The statements set forth in Plaintiffs' Prayer for Relief constitute claims for relief
22 and legal contentions, rather than factual allegations, thereby requiring no answer; to the extent
23 that any such statements could be construed to contain allegations of fact, North Star denies each
24 and every such allegation. North Star further alleges that Plaintiffs are not entitled to any of the
25 requested relief.

26 81. North Star denies each and every allegation set forth in the Complaint that is not
27 specifically admitted herein above.

28 ///

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to the claims asserted in the Complaint, North Star alleges, on information and belief, as follows:

FIRST AFFIRMATIVE DEFENSE

The Complaint, and each Claim for Relief set forth therein, fails to state facts sufficient to plead a claim upon which relief can be granted against North Star.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have sustained no cognizable losses relating to the Plans and therefore lack standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

The applicable statutes of limitations including, but not limited to, ERISA Section 413, 29 U.S.C. § 1113, bar each and every purported claim alleged by Plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are individual in nature and therefore may not be asserted on behalf of the Plans under ERISA Sections 409 and 502(a)(2), 29 U.S.C. § 1109 and 1132(a)(2).

FIFTH AFFIRMATIVE DEFENSE

No claim is stated upon which relief can be granted to the extent that Plaintiffs' Complaint seeks money damages or other legal relief under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

SIXTH AFFIRMATIVE DEFENSE

If Plaintiffs suffered any damages, which North Star denies, these damages proximately resulted from the acts or omissions of persons or entities other than North Star.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs failed to mitigate their alleged damages, thereby precluding or reducing Plaintiffs' right of recovery, if any, from North Star.

EIGHTH AFFIRMATIVE DEFENSE

North Star is protected from liability by Section 409(b) of ERISA, 29 U.S.C. § 1109(b), to the extent that the alleged fiduciary breaches in the Complaint occurred before or after it was a

1 fiduciary.

2 **NINTH AFFIRMATIVE DEFENSE**

3 The alleged fiduciary conduct described in the Complaint was performed, in whole or in
4 part, by an independent entity for whose conduct North Star is not responsible and cannot be held
5 liable.

6 **TENTH AFFIRMATIVE DEFENSE**

7 Plaintiff's purported claim under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), fails
8 to state a claim upon which relief can be granted because the relief sought thereby is duplicative
9 of the relief sought under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2).

10 **ELEVENTH AFFIRMATIVE DEFENSE**

11 Plaintiffs fail to state a claim under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§
12 1132(a)(2) & (a)(3), to the extent North Star was not acting in a fiduciary capacity.

13 **TWELFTH AFFIRMATIVE DEFENSE**

14 The Complaint fails to state a claim upon which relief can be granted to the extent that
15 Plaintiffs' purported claims amount to claims for benefits, since Plaintiffs have failed to exhaust
16 their administrative remedies.

17 **THIRTEENTH AFFIRMATIVE DEFENSE**

18 Plaintiffs' claims are barred by the doctrines of laches.

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 Plaintiffs fail to plead their allegations of fraud and concealment with the requisite
21 particularity.

22 **FIFTEENTH AFFIRMATIVE DFEFENSE**

23 Because Plaintiffs' Complaint is vague, ambiguous, uncertain, and couched in conclusory
24 terms, North Star cannot fully anticipate all defenses that may be applicable to this action.
25 Accordingly, North Star reserves the right to assert additional defenses if and to the extent that
26 such defenses are applicable.

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28 ///

1 WHEREFORE, North Star respectfully requests that the Court dismiss the Complaint in
2 its entirety, award North Star its costs and attorneys' fees incurred in defending this action, and
3 award such other relief as it deems just and proper.

4
5 Dated: February 15, 2007

MORGAN, LEWIS & BOCKIUS LLP

6
7 By /s/ Andrew C. Sullivan

Nicole A. Diller, Esq.

Lisa S. Serebin, Esq.

8 Andrew C. Sullivan, Esq.

9 Attorneys for North Star Trust Company

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